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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
8

9 Michael Pierce,

10 Plaintiff,

11 v.

12 Douglas A. Ducey, in his capacity as
13 Governor of the State of Arizona,

14 Defendant.

No. CV-16-01538-PHX-NVW

ORDER

15
16 Before the Court is Plaintiff's Motion for Entry of Final Judgment on the Merits
17 (Doc. 122) and the responses and replies thereto. The responses principally contend that
18 the case is now moot and beyond the jurisdiction of this Court to enter a merits judgment.
19 The Motion will be granted and a declaratory judgment entered as follows:

20
21 Declaratory judgment is granted in favor of Plaintiff against the Governor of
22 the State of Arizona and his successors in office and those acting on his
23 behalf that the Arizona Statehood and Enabling Act Amendments of 1999,
24 Pub. L. No. 106-133, 113 Stat. 1682 (1999), do not repeal or impair the
25 Enabling Act requirement of congressional consent to any changes to the
26 Arizona State Constitution that affect the investment or distribution of the
27 assets in the School Land Trust Fund established by the Arizona Statehood
28 and Enabling Act until and unless Congress provides consent to such
changes, by way of amendment to the Arizona Statehood and Enabling Act
or otherwise.

1 This case is governed by the principle that voluntary cessation of challenged
2 conduct that can recur does not moot a case and does not deprive a federal court of
3 jurisdiction to enter a merits judgment. The State of Arizona has twice—in 2012 and again
4 in 2016—amended its Constitution to allow greatly increased withdrawal of School Land
5 Trust funds without congressional consent as required by the Arizona Enabling Act. The
6 State and its officers took those monies illegally and spent them. Before and after this suit
7 in 2016, the defendants vociferously proclaimed that they no longer needed congressional
8 consent and persisted in that position through two years of litigation. But on the eve of a
9 ruling in this Court, they obtained a consent in the Consolidated Appropriations Act, 2018,
10 at pages 1803-94 of that 2400-page bill. Yet even as defendants informed this Court that
11 they had obtained the consent, they proclaim still that no such consent was required and
12 that the State could take any amount of School Land Trust funds by merely amending its
13 Constitution. That was a strategic one-time voluntary cessation, repudiated immediately.

14
15 Defendants say this case is now moot because the 2016 Arizona Constitutional
16 Amendment has received congressional consent, which need not be obtained again. But
17 the defendants constrict too narrowly the voluntary cessation exception to mootness.
18 Dismissal as moot would leave the State free to take other increased monies from the
19 School Land Trust without congressional consent in the future, just as it has done twice
20 recently and threatens to do again. The State and the Governor have not disavowed such
21 repetition and have proclaimed their ability to do it again. A voluntary cessation joined
22 with a threat to do it again is the paradigm of unsuccessful blunting of power to adjudicate
23 with its attendant effects of res judicata and assessment of costs and fees. This case is a
24 poster child for the doctrine of voluntary cessation not mooting a case or controversy.

25 **I. ARIZONA’S PATTERN AND CONTINUING THREAT OF**
26 **ILLEGALLY TAKING FUNDS FROM THE SCHOOL LAND TRUST**
27 **FUND WITHOUT CONGRESSIONAL CONSENT**

28 Arizona has followed a long-term policy of cutting funding for public education.

1
2 In the early 1990s, Arizona ranked 34th in the nation in per pupil funding, when we
3 invested 87% of the national average. By 2015, Arizona was only investing 65% of
4 the national average, dropping our ranking to 48th. We also rank at or near the
bottom of all national studies comparing teacher pay among states.

5 *Funding PreK-12 Education*, Arizona Town Hall, at 11 (Nov. 2017),
6 <https://azmemory.azlibrary.gov/digital/collection/statepubs/id/32140/rec/1>.

7 Arizona's decline in public school funding parallels other policies. First is tax
8 cutting in general, which has been endemic since the 1990s. School choice is promoted by
9 charter schools, which receive state funding and at a per pupil rate higher than public school
10 students receive. Tax credits for private school tuition divert tax revenues to private
11 schools. The public schools' slice of the pie has been shrinking, and so has the whole pie.

12 This led to a statute ratified in a 2000 referendum that required the Legislature to
13 increase public school funding annually by the greater of 2% or the rate of inflation. A.R.S.
14 § 15-901.01. That set a floor on the decline in public school funding. But the Legislature
15 consistently defied that statute by denying the annual increase. After a dozen years of no
16 increases, the Arizona Supreme Court held the Legislature's refusal was unlawful and
17 ordered a declaratory judgment against the State and remanded for further proceedings for
18 remedy. *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 308 P.3d 1152 (2013). The
19 declaratory judgment alone required a minimum increase of 24% in the school funding for
20 the next year, assuming only the minimum 2% annual increase for the lost 12 years. The
Legislature did not do even that.

21 The long pendency of that litigation led state leaders to hit on the idea of funding
22 the school spending shortfall from the School Land Trust Funds. In 2012 the Legislature
23 proposed a Constitutional Amendment to allow spending 2.5% annually of the School
24 Trust Fund, regardless of earnings and gains in the fund and in disregard of losses in the
25 fund, as had happened in the years after the 2008 stock market crash. "Best of all, it
26 accomplishes this with NO new taxes and NO additional fund spending." Doug Ducey et
27 al., Argument for Proposition 118, in *Arizona General Election Guide*, Secretary of State
28 Ken Bennett, at 47, [https://apps.azsos.gov/election/2012/Info/PubPamphlet/english/e-](https://apps.azsos.gov/election/2012/Info/PubPamphlet/english/e-book.pdf)
book.pdf. The voters enacted that Amendment, and the State just took the money, without

1 getting or even seeking the congressional approval required by the Enabling Act. As
2 discussed in the March 26, 2018 order, 2018 WL 1472048, there was no credible or even
3 colorable basis to forego that approval. The State just took the money and spent it. No
4 one sued in 2012 to stop them from doing that.

5 That easy run on the School Land Trust was repeated and expanded a scant four
6 years later to meet the State's next funding crisis after the *Cave Creek* case. State leaders
7 settled on the same strategy to avoid raising the taxes needed to comply with that decision.
8 The Legislature proposed another increase in withdrawal from the School Land Trust fund
9 from 2.5% annually to 6.9% annually occasioned by the *Cave Creek* decision, thus
10 "settling" that case entirely with School Land Trust Fund monies.

11 According to the Governor, "Proposition 123 is our innovative way of ensuring that
12 our schools get additional sustainable funding now in into the future—without raising
13 taxes. . . . Proposition 123 . . . settles the education funding lawsuit that has been hanging
14 over our state for too long." Doug Ducey, Argument in Support, *in Arguments Filed in*
15 *Support of Proposition 123*, at 1,
16 <https://apps.azsos.gov/election/2016/Special/PropInfo/123-Pro.pdf>. The Amendment was
17 passed by 50.9% of the vote at the special election.

18 The Governor and the State immediately took \$259,266.20 as a one-time retroactive
19 payment for fiscal year 2015-2016. Analysis by the Legislative Council estimated
20 increased payment under Proposition 123 at "more than two billion dollars over that ten-
21 year period." Analysis by Legislative Council, *in What's on My Ballot? Arizona's Special*
22 *Election Guide*, Secretary of State Michele Reagan at 15,
23 <https://azmemory.azlibrary.gov/digital/collection/statepubs/id/28973>.

24 As discussed in the order of March 26, 2018, during two years of litigation, the
25 Governor and the State vigorously contended that the 1999 congressional consent to the
26 1998 Constitutional Amendment not only approved that amendment but also silently
27 repealed the need for future congressional consent to any future amendment changing or
28 increasing the withdrawals from the School Land Trust. The Governor and the State
withdrew those funds from 2016 to March 26, 2018, without consent of Congress, just as
they had from 2012 to 2015 under the 2012 amendment.

1 The Governor obtained a one-page insert into the 2400-page Consolidated
2 Appropriations Act, 2018 that consented to Proposition 123. That bill was enacted without
3 disclosure to the public or to the Senators and Congressmen who voted on it. By a filing
4 on March 23, 2018, informing the Court of the congressional consent, the Governor and
5 the State disavowed any concession of the merit of Plaintiff's claim and affirmed their
6 position that no congressional consent is necessary, admitting that they got the consent to
7 prevent a merits adjudication without disavowing their conduct. "While Governor Ducey
8 and the State of Arizona continue to maintain that such consent was unnecessary, the issues
9 and arguments raised by Plaintiff in this above-captioned litigation are mooted by the 2018
10 Act." (Doc. 112 at 1.)

11 **II. GOVERNING LAW**

12 **A. Mootness in General**

13 "Article III of the United States Constitution limits the jurisdiction of the federal
14 courts to 'Cases' and 'Controversies.'" *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853,
15 861 (9th Cir. 2017) (citing U.S. Const. art. III, § 2, cl. 1)). This limitation "requires those
16 who invoke the power of a federal court to demonstrate standing—a 'personal injury fairly
17 traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the
18 requested relief.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013) (quoting *Allen v.*
19 *Wright*, 468 U.S. 737, 751 (1984)). As the Court previously concluded, Pierce
20 demonstrated standing. (*See generally* Doc. 113 at 21-30 (explaining that Pierce has
21 standing to enforce the terms of Arizona's School Land Trust against state officials by
22 virtue of his trust beneficiary status).)

23 This limitation also requires that a controversy exist "not only at the time the
24 complaint is filed, but through all stages of the litigation." *Already*, 568 U.S. at 90-91
25 (internal quotation marks and citation omitted). "Where this condition is not met, the case
26 has become moot" and no longer appropriate for judicial review. *Gator.com Corp. v. L.L.*
27 *Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (en banc) (internal citation omitted).

28 However, "[a] case becomes moot only when it is impossible for a court to grant
any effectual relief whatever to the prevailing party." *Knox v. SEIU, Local 1000*, 567 U.S.

298, 307 (2012). “The question is not whether the precise relief sought at the time the case was filed is still available,” but “whether there can be any effective relief.” *McCormack v. Herzog*, 788 F.3d 1017, 1024 (9th Cir. 2015) (alteration omitted) (internal quotation marks and citation omitted)). Ultimately, “[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Knox*, 567 U.S. at 307 (internal quotation marks and citation omitted).

B. Voluntary Cessation Exception to Mootness

It is well-established that “a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued.” *Already*, 568 U.S. at 727 (citing *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982)). Stated differently, “a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” *City of Mesquite*, 455 U.S. at 289. Otherwise, an intransigent defendant could simply “engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends.” *Already*, 568 U.S. at 727.

Therefore, “the standard for determining whether a case has been mooted by the defendant’s voluntary conduct is stringent: A case might become moot if subsequent events make it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal citation omitted) (emphasis added). In addition, it must be clear that “interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1037 (9th Cir. 2018) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). Only when both conditions are satisfied can it be said a case is moot. *County of Los Angeles*, 440 U.S. at 631; *see also Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998) (“Defendants have not carried their heavy burden of establishing *either* that their alleged behavior cannot be reasonably expected to recur, *or* that interim events have eradicated the effects of the alleged violation.” (emphasis in original)). A defendant’s

1 burden of demonstrating mootness is “a heavy one.” *United States v. W.T. Grant Co.*, 345
2 U.S. 629, 632-33 (1953).

3 **1. Recurrence of Wrongful Behavior**

4 A defendant asserting mootness has the “heavy burden” of showing “the challenged
5 conduct cannot be reasonably expected to start up again.” *Fikre*, 904 F.3d at 1037. While
6 courts generally presume a government entity acts in good faith when it changes its policy,
7 when it “asserts mootness based on such a change,” it bears this burden all the same. *Am.*
8 *Diabetes Ass’n v. U.S. Dep’t of the Army*, ___ F.3d ___, No. 18-15242, 2019 WL 4463289,
9 at *4 (9th Cir. Sept. 18, 2019) (internal quotation marks and citation omitted).

10 Three factors are examined in determining whether challenged conduct can
11 reasonably be expected to recur. First is the form of the governmental action, which “is
12 critical, and, sometimes, dispositive.” *Fikre*, 904 F.3d at 1037. For example, the repeal or
13 amendment of a statute is “usually enough to render a case moot” even if the statute can
14 later be reenacted. *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994).
15 In contrast, “an executive action that is not governed by any clear or codified procedures
16 cannot moot a claim.” *McCormack*, 788 F.3d at 1025.

17 Second is the rationale of the governmental action. When a government entity
18 ceases a challenged policy in recognition of the merit of the challenge, the voluntary
19 cessation exception to mootness is less likely to apply. “[T]he government’s unambiguous
20 renunciation of its past actions can compensate for the ease with which it may relapse into
21 them.” *Fikre*, 904 F.3d at 1039. For example, in *White*, the plaintiffs’ challenged conduct
22 was opposing the conversion of a motel into a multi-family housing unit for the homeless
23 by publicly airing their grievances, rallying the business community to their cause, and
24 challenging the integrity of the Zoning Adjustment Board’s decision-making process.
25 *White v. Lee*, 227 F.3d 1214, 1242-44 (9th Cir. 2000). After the Department of Housing
26 and Urban Development (“HUD”) investigated the plaintiffs for engaging in a
27 discriminatory housing practice under the Fair Housing Act, they sued for injunction
28 against the HUD investigation. HUD responded by prohibiting the investigation of non-

1 violent petitioning or lobbying activities, which the Court of Appeals found “represent[ed]
2 a permanent change in the way HUD conduct[ed] FHA investigations,” was “broad in
3 scope and unequivocal in tone,” and was “fully supportive of First Amendment Rights.”
4 *Id.* at 1242-43. HUD’s unequivocal cessation mooted the case for injunction against it, and
5 the voluntary cessation doctrine did not suffice to keep it alive. *Id.*

6 However, when the government ceases a challenged policy without renouncing it,
7 the voluntary cessation is less likely to moot the case. The Ninth Circuit cases are replete
8 with examples of government entities ceasing policies half-heartedly. For example, in
9 *Olagues v. Russoniello*, 770 F.2d 791, 793 (9th Cir. 1985), the plaintiffs sued for monetary
10 and equitable relief in connection with a preliminary investigation led by the United States
11 Attorney for the Northern District of California into possible violations of the Voting
12 Rights Act of 1965. The plaintiffs alleged violations of their federal constitutional rights.
13 *Id.* at 793-94. Even though the investigation was later abandoned, the case was not moot,
14 in part because the U.S. Attorney “did not voluntarily cease the challenged activity because
15 he felt that the investigation was improper.” *Id.* at 795. On the contrary, he “ha[d] at all
16 times continued to argue vigorously that his actions were lawful.” *Id.*; see also *Porter v.*
17 *Bowen*, 496 F.3d 1009, 1016-17 (9th Cir. 2007) (finding a letter from the California
18 Secretary of State to the state legislature tolerating the operation of vote-swapping websites
19 pending clarification of the state election code did not moot a lawsuit because “the
20 Secretary has maintained throughout the nearly seven years of litigation . . . that [her
21 predecessor] had the authority under state law to threaten [the plaintiffs] with
22 prosecution.”).

23 Finally, the gravity of the issues at bar and the public interest counsel against finding
24 mootness in cases presenting important precedential issues. See, e.g., *Boise City Irrigation*
25 *and Land Co. v. Clark*, 131 F. 415, 419 (9th Cir. 1904) (quoted with approval in *S. Pac.*
26 *Terminal v. ICC*, 219 U.S. 498, 516 (1911) (“[T]he courts have entertained and decided
27 such cases before . . . because of the necessity or propriety of deciding some question of
28 law presented which might serve to guide the [legislative] body when again called upon to

1 act in the matter.”)). The “public interest in having the legality of the practice settled []
2 militates against a mootness conclusion.” *W.T. Grant Co.*, 345 U.S. at 632 (finding an
3 action regarding the meaning of a provision of the Clayton Act was not moot); *see also*
4 *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1140 (D. Idaho 2013) (noting the
5 “significant public interest in settling the legality of these provisions” of the Idaho abortion
6 statutes and finding “the existence of this interest” was a factor that “suggest[ed] a live
7 controversy”), *aff’d sub nom McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015).

8 **2. Eradication of Effects of Wrongful Behavior**

9 A defendant must also demonstrate “interim relief or events have completely and
10 irrevocably eradicated” the effects of the challenged behavior. *Fikre*, 904 F.3d at 1037;
11 *see also Citizens for Quality Educ. San Diego v. Barrera*, 333 F. Supp. 3d 1003, 1025 (S.D.
12 Cal. 2018) (“[V]oluntary cessation moots a case only if (1) there is no reasonable
13 expectation that the wrong will be repeated, and (2) interim relief or events have completely
14 eradicated the effects of the alleged violation.” (internal quotation marks and citations
15 omitted)).

16 **III. ANALYSIS**

17 The Governor contends the voluntary cessation exception does not apply because it
18 was Congress, not the Governor, which enacted the congressional consent to Proposition
19 123, that consent need not be obtained again for Proposition 123, and that the “mooting
20 event” here is a change in the law. According to the Governor, the act of voluntary
21 cessation was Congress’ enactment of the Consolidated Appropriations Act, 2018.
22 However, that misstates the part the Governor played in this story. Congress did not act in
23 a vacuum. The Governor sought and obtained the consent necessary to implement the
24 formula changes. Only the Governor could request that consent. The Governor is the “sole
25 official means of communication between” Arizona and the federal government, A.R.S. §
26 41-101(A)(4), so the challenged behavior here is that of the Governor and the Governor
27 alone. The Governor’s request for consent is the voluntary cessation here.

1 In short, Pierce opposed the Governor’s attempt to implement distribution changes
2 without congressional consent. The Governor resisted for two years but then sought such
3 consent on the eve of a ruling. The Governor’s assertion that he somehow was not involved
4 is disingenuous. The Court is not fooled.

5 Second, the Governor argues this case is moot because congressional consent to
6 Proposition 123 need only be given once and has been received. But that overlooks the
7 gist of Plaintiff’s original action—that the Enabling Act requirement of congressional
8 consent was and is still in effect and was not repealed by the 1999 consent to the 1998
9 Arizona Constitutional Amendment. That issue subsists for the 2012 Amendment and for
10 future amendments and is not mooted by the congressional consent to Proposition 123.

11 **A. The Governor Disavows the Need for Congressional Consent Before**
12 **Implementing Distribution Changes**

13 To demonstrate this case is moot, the Governor has the “heavy burden” of showing
14 he cannot reasonably be expected to implement changes to the formula without seeking
15 congressional consent. *Fikre*, 904 F.3d at 1037 (explaining the applicable standard
16 discussed *supra* at 4-6). For the reasons stated below, the Governor has not met this
17 burden.

18 1. As an initial matter, the Governor’s request for congressional consent
19 constitutes an “executive action that is not governed by any clear or codified procedures,”
20 and therefore cannot moot Pierce’s claim. *See McCormack*, 788 F.3d at 1025 (noting “an
21 executive action that is not governed by any clear or codified procedures cannot moot a
22 claim”); *see also Coral Constr. Co. v. King County*, 941 F.2d 910, 928 (9th Cir. 1991)
23 (“[A] case is not easily mooted where the government is otherwise unconstrained should it
24 later desire to reenact the [offending] provision.”). Indeed, no procedures governed the
25 Governor’s actions here and could constrain the Governor’s behavior regarding the
26 implementation of formula changes moving forward except the Enabling Act itself. There
27 is nothing in the parties’ submissions or the record to demonstrate the Governor changed
28 his mind about the merits of Plaintiff’s claim.

1 2. It is even more striking that the Governor continues to insist Arizona need
2 not obtain congressional consent to changes in the formula. Indeed, in the very submission
3 in which he announced—on the eve of the Court’s decision on the merits ruling—he had
4 sought and obtained congressional consent, he “continue[d] to maintain that such consent
5 was unnecessary” and asked the Court to dismiss this action as moot. (Doc. 112.) The
6 Governor did not experience a change of heart that may counsel against a mootness finding.
7 *See White*, 227 F.3d at 1243-44 (finding HUD’s decision to unequivocally change the
8 policy at issue did not fall within the voluntary cessation exception to mootness). Far from
9 seeking congressional consent as a way of showing support for the rights of Arizona
10 citizens as trust beneficiaries, the Governor at the last minute sought consent to moot this
11 litigation and avoid an unfavorable judgment.

12 In this regard, the Governor is no different than the U.S. Attorney in *Olagues* or the
13 California Secretary of State in *Porter*. Indeed, just as those officials continued to argue
14 the challenged policies they ceased were nevertheless permissible, the Governor argues his
15 belated request for congressional consent was unnecessary and his prior expenditures were
16 permissible without the consent. *See Olagues*, 770 F.2d at 795 (holding a case involving
17 an investigation was not mooted by the cessation of the investigation because the lead
18 investigator “at all times” argued “vigorously that his actions were lawful”); *Porter*, 496
19 F.3d at 1016-17 (holding a case involving the possible prosecution of vote-swapping
20 websites was not mooted by a letter from the California Secretary of State because “the
21 Secretary . . . maintained throughout the nearly seven years of litigation . . . that [her
22 predecessor] had the authority” to threaten the plaintiffs with prosecution). Not only has
23 the Governor maintained he has the authority to implement changes without any oversight,
24 he has maintained this stance ever since he or his predecessor in office began implementing
25 the 2012 formula changes. The Governor’s defiance is striking.

26 3. Given the importance of the issues at bar to the citizens of Arizona—both
27 present and future—the public interest in having the legality of the Governor’s behavior
28 settled weighs against a mootness ruling. *See W.T. Grant Co.*, 345 U.S. at 632 (finding the

1 “public interest in having the legality of the practices settled [] militates against a mootness
2 conclusion”). The stewardship of the trust fund was of utmost importance to the framers
3 of the Enabling Act, who took great care in crafting “careful and rigid” restrictions on trust
4 lands, S. Rep. No. 61-454 at 18 (1910), and preserved the rights of Arizonans to enforce it.
5 36 Stat. 557 at 575 (“Nothing herein contained shall be taken as in limitation of the power
6 of the State or of any citizen thereof to enforce the provisions of this act.”). Senator
7 Beveridge noted the “extreme care that should be taken with every provision of a bill like
8 this,” S. Rep. 61-454 at 33.

9 4. The Governor’s arguments to the contrary are unavailing. Congress’s
10 enactment of the Governor’s requested congressional consent was not the voluntary
11 cessation in question. The Governor’s request for consent was the voluntary cessation.
12 For these reasons, the Governor’s discussion of the voluntary cessation standard for
13 legislative action is irrelevant. (Doc. 129 at 5-6.)

14 *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004), is analogous. In *Demery*, the
15 plaintiffs challenged former-Sheriff Arpaio’s use of internet webcams in Maricopa
16 County’s Madison Street Jail to broadcast bookings. *Id.* at 1024-25. During the
17 litigation—and before the district court enjoined the use of the webcams—the third-party
18 vendor ceased operations without explanation. *Id.* at 1025-26. Considering the issue of
19 mootness *sua sponte*, the Court of Appeals found the vendor’s cessation did not moot the
20 case. *Id.* at 1025, 27. “[T]he immediate cause of the defendant’s cessation of the disputed
21 activity was not in the short term voluntary, as it was not Sheriff Arpaio who discontinued
22 the . . . website.” *Id.* at 1026. Article III jurisdiction remained because, based on Arpaio’s
23 “unequivocal representations,” he was likely to reactivate the webcams in the absence of
24 an equitable judgment and was actively looking for a new website to host the images. *Id.*

25 5. Second, the Governor proclaims himself free to implement changes to the
26 distribution formula without congressional consent, though further consent is not needed
27 for Proposition 123. The Governor argues this case is moot because he has “no control
28 over the constitutional amendment process.” (Doc. 129 at 5 n.2.) But the Governor has

1 sole authority to initiate a request for congressional consent to past or future constitutional
2 amendments enacted by the voters. The Governor has the heavy burden of demonstrating
3 that he or his successors in office will not take new distributions from the School Land
4 Trust Fund without getting congressional approval if such amendments are ever enacted.
5 The burden is on the Governor to show there will be no such future amendments. He has
6 not attempted to do so and cannot.

7 For voluntary cessation to defeat mootness it is not necessary to show that a future
8 amendment of the Arizona Constitution to draw even more money will happen or even is
9 likely. But it is more than plausible that such an amendment will be sought. It is likely
10 after 2025 when Proposition 123 expires. At that time the State will be habituated to the
11 generous distributions from the School Land Trust to make up for decades of tax cuts and
12 other refusal to fund current education from taxes. That is even more likely due to the
13 Arizona Constitution's one-way ratchet on tax increases since 1992. Ariz. Const. art. XIX
14 sec. 22. That allows a tax cut by a majority vote of the Legislature, but a tax increase only
15 by a two-thirds vote. Even a legislative minority will then be able to force the Legislature
16 to propose a constitutional amendment to retain some or all the school funding now being
17 paid from the School Land Trust.

18 **B. The Governor Fails to Show His Request for Consent Has Completely and**
19 **Irrevocably Eradicated the Effects of His Implementation of the Changes**
20 **to the Formula**

21 Mootness is further defeated because the Governor has not shown his belated
22 request for consent completely and irrevocably eradicated the effects of the unauthorized
23 distributions. The parties are still litigating issues related to Proposition 118 and
24 Proposition 123 in state court that depend in part on whether the 1999 congressional
25 consent to the 1998 Arizona Constitutional Amendment repealed the need for
26 congressional consents to later amendments. The Governor's requested consent for
27 Proposition 123 has not brought closure, as Pierce currently seeks relief in state court.
28 (Doc. 110, Ex. A, at 11, ¶ 56(a.)) "As long as the parties have a concrete interest, however

1 small, in the outcome of the litigation, the case is not moot.” *Knox*, 567 U.S. at 307
2 (internal quotation marks and citation omitted).

3 **C. The Court Shall Enter a Declaratory Judgment**

4 In his Third Amended Complaint, Pierce asks the Court to enjoin the Governor
5 “from implementing any changes to the Arizona Constitution that affect the investment or
6 distribution of the assets in the School Trust Fund . . . until and unless Congress provides
7 such consent to such changes” In lieu of the permanent injunction that Pierce seeks
8 (Doc. 134 at 6, ¶ 3), the Court in its discretion shall issue a declaratory judgment in the
9 form stated at the beginning of this order.

10 Under the Declaratory Judgment Act, “[i]n a case of actual controversy within its
11 jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading,
12 may declare the rights and other legal relations of any interested party seeking such
13 declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).

14 The phrase “case of actual controversy” refers to the type of “Cases” and
15 “Controversies” justiciable under Article III. *MedImmune, Inc. v. Genentech, Inc.*, 549
16 U.S. 118, 126-27 (2007). The test for determining whether a “case of actual controversy”
17 exists is “whether the facts alleged, under all the circumstances, show that there is a
18 substantial controversy, between parties having adverse legal interests, of sufficient
19 immediacy and reality to warrant the issuance of a declaratory judgment.” *Md. Cas. Co.*
20 *v. Pac. Co.*, 312 U.S. 270, 273 (1941) (internal citation omitted). For the reasons stated
21 above, this requirement has been met.


22 While Pierce did not pray for a declaratory judgment, the Court is authorized to
23 enter whatever relief he is entitled to. *See* Fed. R. Civ. P. 54(c) (“Every . . . final judgment
24 [except a default judgment] should grant the relief to which each party is entitled, even if
25 the party has not demanded that relief in its pleadings.”). Moreover, a declaratory judgment
26 may be entered *sua sponte*. *See Arley v. United Pac. Ins. Co.*, 379 F.2d 183, 187 (9th Cir.
27 1967) (“True, plaintiff prayed for rescission, but this did not impair the [district] court’s
28 power, indeed its duty, to render such judgment as on the entire record the law required to

1 finally determine the litigation.”); *see also Greenfield MHP Assoc’s, L.P. v. Ametek, Inc.*,
2 Case No. 3:15-cv-01525-GPC-AGS, 2018 WL 1757527, at *16 (S.D. Cal. Apr. 12, 2018)
3 (“The Ninth Circuit has interpreted Rule 54(c) to mean that declaratory and injunctive relief
4 can be awarded in a case in which the plaintiff did not request such relief in the operative
5 complaint.”).

6 “A declaratory judgment is binding on the parties before the court and is claim
7 preclusive in subsequent proceedings as to the matters declared.” 10B Charles Alan
8 Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2771 (4th
9 ed. 2016); *see also Burlington Ins. Co. v. Oceanic Design & Constr., Inc.*, 383 F.3d 940,
10 952 (9th Cir. 2004) (“A declaratory judgment is a binding adjudication that establishes the
11 rights and other legal relations of the parties where those rights are in doubt.” (internal
12 quotation marks and citation omitted)). Indeed, “[a] court may grant declaratory relief even
13 though it chooses not to issue an injunction,” and “[a] declaratory judgment can then be
14 used as a predicate to further relief, including an injunction.” *Powell v. McCormack*, 395
15 U.S. 486, 499 (1969) (internal citations omitted). If the Governor chooses to again ignore
16 the Enabling Act requirement of congressional consent, an injunction would readily follow.

17 IT IS THEREFORE ORDERED that Declaratory Judgment be entered in the form
18 stated above. The Clerk shall terminate this action.

19 Dated: September 30, 2019.

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21 _____
22 Neil V. Wake
23 Senior United States District Judge
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